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BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

IN RE: 5-YEAR PERMIT RENEWAL, CO-OP MINING COMPANY, BEAR CANYON MINE, EMERY COUNTY, UTAH	)	**REPLY TO SUPPLEMENTAL MEMORANDUMS**
	)	**CAUSE NO. ACT/015/025**
	)	**Docket No. 95-025**

Castle Valley Special Service District ("Castle Valley"), North Emery Water Users Association ("NEWUA") and Huntington-Cleveland Irrigation Company ("Huntington-Cleveland") (collectively, "Appellants"), by and through their respective attorneys, Jeffrey W. Appel and W. Herbert McHarg of Appel & Warlaumont, and J. Craig Smith, David B. Hartvigsen, and Scott Ellsworth of Nielsen & Senior, respectfully submit this Reply to Supplemental Memorandums of the Division of Oil, Gas and Mining

("Division") and Co-Op Mining Company ("Co-Op").

I. APPELLANTS' OBJECTIONS ARE NOT BARRED BY COLLATERAL ESTOPPEL

For the reasons set forth in Appellants' Supplemental Memorandum and previous arguments made before the Division, the Board, and the Utah Supreme Court which are incorporated herein, Appellants' are not barred by Collateral Estoppel.

It is important to note that this Board remanded the issue regarding collateral estoppel to the Division for consideration. Board Order dated February 23, 1996 at 4. As stated by the Division in its Supplemental Memorandum, Appellants were specifically limited by the Board in their presentation of evidence during the hearing on the Tank Seam. The Division agrees with Appellants that the issues cannot be "completely, fully, and fairly litigated" until the Appellants are allowed to present excluded evidence, new evidence, and evidence of events that occurred subsequent to the Board's Order. Further, the Division has stated that Co-Op has not met its burden of proving the necessary elements of collateral estoppel. On that basis, collateral estoppel cannot apply.

Beyond the Division's argument that the Supreme Court's finding is not dispositive on the issue of whether the Appellants received a hearing on the Blind Canyon Seam, it is important to note that the Utah Supreme Court might not have reached this finding if the circumstances were different. Regardless of the of the Board's findings, if the Supreme Court had all of the necessary

evidence before it, that Court might not have found that sufficient evidence existed to support the Board's findings on the Blind Canyon Seam.

Appellants disagree with the Division's recommendation that the Board request Appellants to proffer evidence that was not presented at the Tank Seam Hearing either because of the Board's limitations or evidence that has arisen subsequent to the Hearing. This recommendation missed the point. The Tank Seam Hearing was a hearing solely on the Tank Seam. Appellants are now entitled to a complete hearing on the Five-Year Permit Renewal that involves the Blind Canyon Seam. Proffering such evidence out-of-context simply to determine whether Appellants are collaterally estopped from presenting the evidence defies logic and is a needless waste of time and resources. All of the evidence related to Appellants case on the Permit Renewal should be heard at the hearing before the Board.

Co-Op's arguments are not persuasive and do not refute those of the Division and the Appellants. Co-Op merely presents general statements of law regarding the applicability of collateral estoppel to administrative decisions and concludes, without analysis of the elements, that Appellants are barred by the doctrine. This is not sufficient.

Co-Op also misconstrued the issues. Neither Appellants nor the Division have argued that collateral estoppel deprives the Board of jurisdiction. What Appellants had argued is that the Board lacked jurisdiction to reach Findings of Fact and Conclusions

of Law on issues that were not before them.

On page five of its Supplemental Memorandum, Co-Op claimed that certain issues were previously adjudicated and conclusively resolved. However, Co-Op's list simply highlights issues that were determined solely in relation to the Tank Seam, involved evidence that existed at that time, and were thus not competently, fully, and fairly litigated in connection with the Blind Canyon Seam. Co-Op itself argued that "[Appellants] did not request, are not entitled to, and did not receive a hearing on whether to approve or modify CWM's [Co-Op] existing permit. . .. the only question is whether CWM satisfied the requirements for approving the significant revision to permit mining the Tank Seam. (R. 747)(emphasis added). The Board and the Utah Supreme Court reached similar conclusions. See statements quoted in Appellants' Supplemental Memorandum at 4-6. Therefore collateral estoppel cannot apply to these issues.

II. THIS BOARD SHOULD APPOINT A NEUTRAL HEARING EXAMINER TO SAVE TIME AND ASSIST WITH INTERPRETING HIGHLY TECHNICAL INFORMATION

The Appellants incorporate the arguments contained in their Supplemental Memorandum illustrating that appointment of an expert hearing examiner will save this Board time and provide it with valuable expertise and unbiased interpretation of highly technical hydro-geologic information. The concerns of Co-Op and the Division are readily addressed. First, Appellants have requested that this Board appoint a neutral hearing examiner trained in hydro-geology.

Without this expertise, the examiner would be of little value. Only one trained in these disciplines could make useful recommendations to this Board. This is necessary to a fair resolution of these technical issues. Appellants know of several qualified individuals, for instance, Todd Jarvis of Weston Engineering, that could address this task professionally, neutrally, and at a reasonable expense.

Second, despite Co-Op's unsupported argument, there is no requirement that a hearing examiner have legal training. Certainly, this Board is not required to be trained in law. The examiner would hear, evaluate, and resolve the many technical hydro-geologic issues as an expert and on an impartial basis, and then recommend findings for this Board's consideration.

Third, the appointment of a hearing examiner will assist in the speedy resolution of this matter. An examiner will comprehend the technical evidence as it is introduced. This would avoid cumulative presentation and the belaboring chore for this Board to sort through the evidence after the hearing in an attempt first to understand, next to categorize, and finally to resolve each piece of evidence in relation to the issues. This assignment is more appropriately delegated to a neutral, qualified expert who tackles these types of issues on a daily basis.

Of course, if this Board disagrees with the examiner's recommendations, it may grant a de novo hearing on <u>those particular issues</u> before this Board. Although this Board <u>may</u> re-hear the entire case, there is no requirement that it do so. Under R641-

113-500, this Board may:

> accept, reject, or modify such proposed rulings, findings, and conclusions in whole or in part or may remand the case to the hearing examiner for further proceedings, or the Board may set aside the proposed rulings, findings, and conclusions of the hearing examiner and grant a de novo hearing before the Board.

Utah Admin. Code R641-113-500 (1997) (emphasis added).

Even if this Board finds some deficiencies in the examiner's opinion, a quick hearing on one or two discrete issues is much speedier than the time it would take for this Board to tediously plough through all of the highly technical evidence. Beyond aiding in its quick resolution, appointment of a hearing examiner will help to distill the issues for closure of this case. There may be no need to go through the entire process of objecting to another renewal of the permit if the issues are completely, fairly, and expertly resolved at this juncture.

Finally, it must also be noted that despite Co-Op's argument, any hearing examiner would not be bound by collateral estoppel for the same reasons that this Board is not barred. If this Board determines that Appellants are not barred by the doctrine, then any evidence that would have be presented directly to this Board could be presented to the examiner.

III. CONCLUSION

Therefore, Appellants jointly request that this Board (1) find that collateral estoppel does not apply, and (2) appoint a hearing examiner.

Respectfully submitted this 24th day of November, 1997.

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of November, 1997, I caused a true and correct copy of the foregoing Supplemental Memorandum in Support of Appellants' Request for Hearing Examiner and in Opposition to Collateral Estoppel to be mailed, postage pre-paid, to the following:

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